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EON Bank Bhd v KSU Holdings Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D7–22–788 OF 2003
HANIPAH FARIKULLAH JC
12 OCTOBER 2010

Banking — Security for advances — Corporate guarantee — Claim by plaintiff for specific performance of corporate guarantee — Whether formal corporate guarantee executed — Defendant's board resolution given authorising corporate guarantee to be given — Whether existence of corporate guarantee established

Companies and Corporations — Meetings — Resolutions — Effect of resolutions — Internal document — Whether company compelled to carry out matters stated in resolution — Whether resolutions can be specifically enforced — Whether resolutions create legal relationship between company and third parties

Contract — Formation — Subject to contract — Corporate guarantee — Whether corporate guarantee existed despite no formal corporate guarantee being executed — Whether terms and conditions agreed upon — Whether parties reached consensus ad idem — Whether contract established

Evidence — Adverse inference — Failure of plaintiff to call witness — Whether material witness — Persons who could give firsthand account of relevant facts — Whether adverse inference ought to be drawn against plaintiff — Evidence Act 1950 s 114(g)

The plaintiff, a licensed financial institution claimed against the defendant for specific performance of a corporate guarantee in the sum of RM40,000,000 in favour of the plaintiff, to secure the term loan facility ('the loan') granted to May Plastic Sdn Bhd ('MPI'). The defendant however contended that the defendant was never a party or privy to any of the agreements between the plaintiff and MPI. Further, the defendant pleaded that the parties were never ad idem on the terms and conditions of the draft guarantee and indemnity and hence there was no agreement between the parties. MPI had requested for the loan for the purposes of redeeming RM40,000,000. Bonds issued by MPI to bondholders. The letter of offer provided, inter alia, that: (i) the loan was to be secured by the existing securities and the defendant's guarantee for the repayment of the facility, including all fees, costs and expenses that are to be settled by MPI; and (ii) it was a condition precedent to the loan that a certified

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true copy of the defendant's board resolution be given authorising the defendant to provide its corporate guarantee in consideration of the facility. The loan was disbursed to MPI. Subsequently a draft corporate guarantee was sent to the defendant for approval and execution but the defendant did not execute the same. The plaintiff claimed that in consideration of the granting of the loan to MPI, the defendant had undertaken to execute the corporate guarantee. PW2 testified that the defendant's representatives attended various meetings where defendant, through its representatives, agreed to provide its undertaking to execute the corporate guarantee for the purposes of securing the loan. PW2 however could not remember the names of the representatives of the defendant who attended the meetings. The defendant denied that it had at the time ever represented that it would execute a corporate guarantee. The defendant claimed that the defendant's resolution dated 14 September 2000 was only an internal document and not a contract. According to the defendant, the plaintiff could not have disbursed the loan relying on this resolution as the said resolution was never in the plaintiff's custody at the time the loan was disbursed to MPI. The primary issue to be determine was whether the defendant undertook to execute the corporate guarantee.

Held, dismissing the plaintiff's case with costs:

(1) Ong Boon Poh and Bernard Foo were the persons who could give the court a firsthand account of all the negotiations between the plaintiff and the defendant. An adverse inference could be drawn against the plaintiff under s 114 (g) of the Evidence Act 1950 for not calling Bernard Foo and Ong Boon Poh to testify. No explanation was given by the plaintiff why both of them were not called to give evidence. Bernard Foo and Ong Boon Poh could have cleared the doubt and verified if the defendant's representatives had in fact attended the meetings at the material times and given undertaking to the plaintiff that the defendant will execute a corporate guarantee (see para 42).

(2) It is implausible that the plaintiff who was giving out a term loan of RM40,000,000 did not have documents that conclusively showed that the defendant, not only attended, but agreed to give the corporate guarantee. The compelling and irresistible conclusion was that the defendant's representatives neither attended any of the meetings nor agreed to give a corporate guarantee to the plaintiff (see para 44).

(3) By its letter dated 18 April 2002 the plaintiff wrote to MPI requesting a copy of the resolution. The said request clearly supported the defendant's case that the plaintiff did not have the resolution prior to the disbursement of the loan as otherwise they would not have had to ask for the resolution (see para 50).

(4) A resolution is an internal document authorising and empowering the defendant to carry out matters stipulated therein. It does not require or

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compel the defendant to do or carry out any of the matters stated therein. Thus, it would be wrong in law for the court to accept the plaintiff's contention that the resolution was an undertaking given by the defendant to the plaintiff capable of being specifically enforced. By law the resolution did not create any legal relationship between the plaintiff and the defendant; *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors* [1994] 3 MLJ 405 followed; *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action* [1996] 3 MLJ 385 referred (see paras 57–58).

(5) On a balance of probabilities the defendant did not at any time enter into any contractual relationship with the plaintiff vis-a-vis the loan and neither did it give the defendant any undertaking to execute a corporate guarantee (see para 60).

(6) In certain exceptional cases where the intention of the parties is clearly established, an immediately binding contract may come into force, even though a formal agreement is to be executed subsequently. In the present case, none of the documents relied on by the plaintiff showed an ad idem between the parties on the terms and conditions of the draft guarantee and indemnity. There were no terms and conditions that were agreed. The parties never reached consensus ad idem. Even the plaintiff contended that the guarantee was to be executed in a formal agreement. In such a situation 'nothing short of signing the document by both parties could bring a contract into existence' (see paras 73 & 77).

[Bahasa Malaysia summary

Plaintif, institusi kewangan berlesen membuat tuntutan terhadap defendan untuk pelaksanaan spesifik bagi jaminan korporat dalam jumlah RM40,000,000 berpihak kepada plaintif untuk menjamin kemudahan pinjaman berjangka ('pinjaman') yang diberikan kepada May Plastic Sdn Bhd ('MPI'). Walau bagaimanapun, defendan berhujah bahawa defendan tidak pernah menjadi parti atau privi kepada mana-mana perjanjian di antara plaintif dan MPI. Tambahan, defendan memplid bahawa pihak-pihak tidak pernah bersetuju atas terma-terma dan syarat-syarat draf jaminan dan indemniti justeru, tidak terdapat perjanjian di antara mereka. MPI telah memohon untuk pinjaman bagi tujuan menebus RM40,000,000. Bon-bon telah dikeluarkan oleh MPI kepada pemegang-pemegang bon. Surat tawaran memperuntukkan, antara lain, bahawa: (i) pinjaman tersebut hendaklah dijamin oleh sekuriti-sekuriti yang wujud dan jaminan defendan untuk membayar semula kemudahan tersebut, termasuk semua fi, kos dan perbelanjaan yang mana harus dilangsaikan oleh MPI; dan (ii) adalah menjadi syarat duluan bagi pinjaman tersebut bahawa salinan yang diakui sah oleh resolusi lembaga defendan yang memberi kuasa kepada defendan untuk memberi jaminan korporatnya sebagai balasan untuk kemudahan tersebut

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hendaklah diberikan. Pinjaman tersebut telah dibayar kepada MPI. Berikutan itu, draf jaminan korporat telah dihantar kepada defendan untuk kelulusan dan ditandatangani tetapi defendan tidak menandatangani draf tersebut. Plaintif mendakwa bahawa sebagai balasan kerana memberikan pinjaman tersebut kepada MPI, defendan telah berjanji untuk menandatangani jaminan korporat tersebut. PW2 memberi keterangan bahawa wakil-wakil defendan telah menghadiri pelbagai mesyuarat di mana defendan, melalui wakil-wakilnya, telah bersetuju untuk memberikan akujanjinya untuk menandatangani jaminan korporat bagi tujuan menjamin pinjaman tersebut. PW2 walau bagaimanapun, tidak ingat nama wakil-wakil defendan yang menghadiri mesyuarat-mesyuarat tersebut. Defendan menafikan bahawa ia telah menyatakan bahawa ia akan menandatangani jaminan korporat pada masa itu. Defendan mendakwa bahawa resolusi defendan bertarikh 14 September 2000 hanyalah dokumen dalaman dan bukan sebuah kontrak. Menurut defendan, plaintif tidak mungkin membayar pinjaman tersebut bersandarkan kepada resolusi ini memandangkan resolusi tersebut tidak pernah berada dalam jagaan plaintif semasa pinjaman dibayar kepada MPI. Isu utama untuk ditentukan adalah sama ada defendan telah mengaku janji untuk menandatangani jaminan korporat tersebut.

Diputuskan, menolak kes plaintif dengan kos:

(1) Ong Boon Poh dan Bernard Foo adalah mereka yang boleh memberi gambaran pertama tentang kesemua perundingan di antara plaintif dan defendan. Inferens bertentangan boleh dibuat terhadap plaintif di bawah s 114(g) Akta Keterangan 1950 kerana tidak memanggil Bernard Foo dan Ong Boon Poh untuk memberi keterangan. Tiada penjelasan yang diberikan oleh plaintif tentang mengapa kedua-duanya tidak dipanggil untuk memberi keterangan. Bernard Foo dan Ong Boon Poh mungkin boleh melenyapkan keraguan dan mengesahkan sama ada wakil-wakil defendan pada hakikatnya telah menghadiri mesyuarat-mesyuarat pada masa matan dan telah memberikan akujanji kepada plaintif bahawa defendan akan menandatangani jaminan korporat tersebut (lihat perenggan 42).

(2) Adalah tidak dapat dipercayai bahawa plaintif yang telah memberikan pinjaman berjangka berjumlah RM40,000 tidak mempunyai dokumen-dokumen yang dengan konklusif menunjukkan bahawa defendan, bukan sahaja telah menghadiri, malahan telah bersetuju untuk memberikan jaminan korporat tersebut. Kesimpulan yang jelas dan nyata adalah wakil-wakil defendan tidak menghadiri sebarang mesyuarat mahupun bersetuju untuk memberi jaminan korporat kepada plaintif (lihat perenggan 44).

(3) Melalui suratnya yang bertarikh 18 April 2000, plaintif telah menulis kepada MPI untuk memohon salinan resolusi tersebut. Permintaan

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tersebut dengan jelas menyokong kes defendan bahawa plaintif tidak mempunyai resolusi tersebut sebelum pinjaman dibayar, jika tidak, mereka tidak akan meminta resolusi tersebut (lihat perenggan 50).

(4) Resolusi adalah dokumen dalaman yang memberi kuasa kepada defendan untuk melakukan perkara-perkara yang ditetapkan di dalamnya. Ia tidak memerlukan atau memaksa defendan untuk melakukan mana-mana perkara yang dinyatakan di dalamnya. Justeru, adalah salah di sisi undang-undang bagi mahkamah untuk menerima hujahan plaintif bahawa resolusi tersebut adalah akujanji yang diberikan oleh defendan kepada plaintif yang boleh dikuat kuasa dengan spesifik. Mengikut undang-undang, resolusi tersebut tidak mewujudkan sebarang hubungan sah di antara plaintif dan defendan; *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors* [1994] 3 MLJ 405 diikut; *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action* [1996] 3 MLJ 385 dirujuk (lihat perenggan 57–58).

(5) Berdasarkan imbangan kebarangkalian defendan pada bila-bila masa tidak memeterai apa-apa hubungan kontrak dengan plaintif iaitu pinjaman tersebut mahupun telah memberikan defendan apa-apa akujanji untuk menandatangani jaminan korporat tersebut (lihat perenggan 60).

(6) Dalam beberapa kes luar biasa di mana niat pihak-pihak telah jelas dibuktikan, satu kontrak mengikat boleh wujud, meskipun suatu perjanjian rasmi selanjutnya akan ditandatangani. Dalam kes ini, tiada dokumen yang dirujuk oleh plaintif menunjukkan ad idem di antara pihak-pihak tentang terma-terma dan syarat-syarat draf jaminan dan indemniti. Tiada terma-terma dan syarat-syarat yang dipersetujui. Pihak-pihak tidak mencapai sebarang consensus ad idem. Malahan plaintif berhujah bahawa jaminan tersebut sepatutnya ditandatangani di dalam perjanjian rasmi. Dalam keadaan tersebut, 'nothing short of signing the document by both parties could bring a contract into existence' (lihat perenggan 73 & 77).]

Notes

For cases on adverse inference in general, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 160–312.

For cases on meetings in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 430–483.

For cases on securities for advances in general, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2468–2653.

For cases on subject to contract in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3823–3832.

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Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action [1996] 3 MLJ 399, HC (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance [1999] 1 MLJ 303, CA (refd)

CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 8 MLJ 607; [2010] 3 AMR 194, HC (refd)

Crossley v Maycock (1874) 43 LJCH 379 (refd)

Daiman Development Sdn Bhd v Mathew Lui Chin Teck & anor appeal [1981] 1 MLJ 56, PC (refd)

Ho Kam Phaw v Fam Sin Nin [1998] 2 MLJ 713, CA (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors [1994] 3 MLJ 405, HC (folld)

Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39; [1983] CLJ 231 (Rep), FC (refd)

Munusamy v Public Prosecutor [1987] 1 MLJ 492; [1987] CLJ (Rep) 221, SC (refd)

Pembinaan Bumi Gemilang Sdn Bhd v RHB Bank Berhad & Anor [2009] 1 LNS 1006, HC (refd)

Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68, HC (refd)

Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh [2001] 5 MLJ 317; [2003] 4 CLJ 859, HC (refd)

Legislation referred to

Companies Act 1965 s 176
Evidence Act 1950 s 114(g)

J Kannapperan (Sathya Kumardas with her) (Shearn Delamore & Co) for the plaintiff.

Pathmanathan (T Selva and Shanti Pathmanathan with him) (MP Samy & Co) for the defendant.

Hanipah Farikullah JC:

[1] The plaintiff, Eon Bank Bhd is a licensed financial institution formerly known as Malaysian Industrial Development Finance Bhd ('MIDF'). The defendant, KSU Holdings Bhd is a company registered under the Companies Act 1965.

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[2] The plaintiff claims against the defendant for specific performance of a corporate guarantee in the sum of RM40,000,000 in favour of the plaintiff, to secure the term loan facility granted to May Plastic Sdn Bhd ('MPI'). A

[3] The plaintiff's claim is disputed by the defendant. The defendant contends that the defendant was never a party or privy to any of the agreements between the plaintiff and MPI prior to the disbursement of the term loan facility on 3 September 2000 to MPI. Further, the defendant pleads that the parties were never ad idem on the terms and conditions of the draft guarantee and indemnity and hence there was no agreement between the parties. B C

AGREED FACTS

[4] It is not disputed between the plaintiff and the defendant that on 12 July 1996, MIMB and MIDF ('the lenders') granted a bank guarantee facility ('the BG facility') of up to RM41.4m to MPI, which was utilised by MPI for the purposes of issuance of bank guarantee by the lenders to guarantee the payment obligations of MPI under certain bonds that were issued by MPI. D

[5] The BG facility was secured by six securities as listed in preamble C of the bond redemption facility agreement dated 20 November 2000 at p 60 of bundle A ('the existing securities'). E

[6] MPI fell into financial difficulties, which resulted in the downgrading of their bond ratings and therefore the bondholders have sought an early redemption of the bonds, which were due to mature on 3 September 2001 and called on the bank guarantee. F

[7] The lenders agreed to allow MPI to refrain from making payment on the bank guarantees or taking any action to enforce the existing securities so as to give MPI more time to procure an investor ('White Knight') to take over control of MPI and assume its assets and liabilities. In mid 2000, MPI identified the defendant as the White Knight. G H

[8] On 14 July 2000, MPI wrote to MIMB to request for a term loan facility for the purposes of redeeming the RM40,000,000 bonds issued by MPI to the bondholders. The lenders agreed to grant and avail up to their respective portions a term loan facility of up to RM40,000,000 which was eventually availed for RM39,852,000) to MPI to partly finance the early redemption of the RM40,000,000 bonds issued by MPI maturing on 3 September 2001 ('the bonds') and to extinguish the bank guarantee issued by the lenders in connection with the bonds upon such terms and conditions contained in the agreement. I

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[9] MIMB's letter of offer dated 14 September 2000 to MPI provides, inter alia, that:

(a) the term loan facility was to be secured by the existing securities and the defendant's guarantee for the repayment of the facility, including all fees, costs and expenses that are to be settled by MPI; and

(b) it was, inter alia, a condition precedent to the term loan facility that MIMB receives a certified true copy of the defendant's board of resolution authorising the defendant to provide its corporate guarantee in consideration of the facility.

[10] The term loan facility was disbursed to MPI on 30 November 2000. The term loan was to be fully repaid by MPI on or before 3 September 2001 and MPI was until such date to pay interest at the applicable rates at the date stipulated in the agreement.

[11] MPI subsequently entered into a debt restructuring scheme ('the scheme') pursuant to s 176 of the Companies Act 1965 with its members and the defendant which was intended, inter alia, to result in MPI becoming a wholly owned subsidiary of the defendant.

[12] Pursuant to the scheme being approved by MPI's members and receiving court sanction, the scheme as proposed was successfully implemented on 10 May 2002. MPI became a wholly owned subsidiary of the defendant and the shares of the defendant were listed and quoted on the Second Board of the Kuala Lumpur Exchange in place of MPI.

[13] Vide letters dated 10 July 2002 and 22 July 2004 Messrs Nik Hussein & Partners, solicitors acting for the lenders sent a draft corporate guarantee for the approval and execution of the defendant but the defendant did not execute the same.

THE PLAINTIFF'S CASE

[14] The plaintiff called three witnesses to support its case. Liew Fooi Voon ('PW1') is the Vice President of the Credit Recovery of Eon Bank Bhd, testified that in consideration of the lenders agreeing to grant the term loan to MPI, the defendant did undertake to execute a corporate guarantee of up to RM40,000,000 in favour of MIMB, acting as agent for itself and MIDF.

[15] According to PW1, it was a term and condition of the bond facility agreement that MPI was to cause the defendant to execute the corporate guarantee upon the scheme being successfully implemented and MPI becoming a wholly owned subsidiary of the defendant.

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[16] Edward Yeong Boon Hong ('PW2'), previously the senior manager, corporate banking with MIMB, testified that the defendant's representatives attended various meetings held with the lenders and MPI during the period of 11 July 2000 to 14 September 2000 and supported MPI's application for the term loan facility. PW2 said that at these meetings, the defendant, through its representatives, agreed to provide its undertaking to execute the corporate guarantee of up to RM40,000,000 for the purposes of securing the term loan facility and represented that the corporate guarantee would be executed upon successful implementation of the scheme and MPI becoming a wholly owned subsidiary of the defendant. According to PW2, the lenders relied on the undertaking and representations of the defendant in agreeing to grant the term loan to MPI.

[17] In cross-examination, PW2 admitted that he could not remember the names of the representatives of the defendant who attended the meetings due to lapse of ten years. However, later PW2 explained that Mr Bernard Foo and Mr Ong Boon Poh, the defendant's ex-director were amongst the persons representating the defendant at that material time.

[18] When PW2 was referred during cross-examination to the Board's Resolution dated 14 November 2000, PW2 said that he does not know who received the Board's resolution and he cannot remember whether the defendant received it by hand, post or whether there was a covering letter attended to the resolution.

[19] Further, according to PW2, the defendant clearly recognises in its prospectus dated 30 March 2003 (pp 264–356 of bundle A) under section 10.3, at p 284 that that one of the contingent liabilities of the defendant was the corporate guarantee to be provided by the defendant in favour of the lenders.

[20] PW2 also testified that the defendant had in its annual report for the financial year 2001 at note 31 p 57 states its undertaking to guarantee the banking facilities granted to MPI.

[21] It is the plaintiff's case that the undertaking given by the defendant already sets out the essential terms of the corporate guarantee, namely that:

(a) The identity of the parties to the guarantee — the corporate guarantee was to be provided by the defendant, as guarantor, in favour of MIMB (agent for itself and MIDF), as guarantee;

(b) the amount guaranteed — a sum of up to RM40,000,000;

(c) the consideration for the guarantee — lenders agreeing to grant a term

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loan facility of up to RM40m to MPI for the purposes of financing the early redemption of MPI's RM40,000,000 3.5% guaranteed redeemable bonds maturing on 3 September 2001;

(d) the purpose of the guarantee — as security for the term loan facility; and

(e) other terms and conditions — to be contained in a deed of guarantee.

THE DEFENDANT'S CASE

[22] The defendant's first witness Ramachandran a/l Kenaparasi Pillai ('PW1') was appointed chairman of the defendant on 22 August 2005. PW1 testified that there are no records to show that the defendant had prior to or at the time of the disbursement of the term loan of RM40,000,000 ever gave or represented to MIMB or MIDF that they would execute a corporate guarantee in their favour for RM40,000,000.

[23] In respect of the defendant's resolution dated 14 September 2000, DW1 testified that it is only an internal document and not a contract because there was no record that the defendant had forwarded a copy to MIMB and MIDF to be acted upon as a contract. According to DW1, the plaintiff could not have disbursed the loan relying on this resolution as the said resolution was never in the plaintiff's custody at the time the term loan was disbursed to MPI. DW1 clarified that a copy of the resolution was in fact obtained by the plaintiff only some time in June 2002, more than one and half years after the loan was disbursed.

[24] To a question from learned counsel for the defendant whether the defendant's letter dated 11 July 2001 and 19 September 2001 can be construed as the defendant giving an undertaking to execute a corporate guarantee in favour of MIMB and MIDF, this is what DW1 said in evidence:

> This letter cannot by any stretch of imagination be construed as an undertaking or continuous representation or undertaking by the Defendant to MIMB and MIDF that it would execute the Corporate Guarantee.
>
> The said letter never stated that the Defendant would execute a Corporate Guarantee to cover the term loan nor could it be construed that the Defendant could execute the same.
>
> The true purpose of the said letter was to obtain the consent of the Defendant for the deferment of the payment of the term loan by MPI, as the Defendant's consent was required by reason of the Debt Restructuring Scheme.
>
> As stated earlier, the Defendant was a 'White Knight' in the rescue scheme cum debt restructuring of MPI and its consent was needed without any obligation on the part of the Defendant to neither assume this liability nor give any undertaking to the Plaintiff.

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> As far as the record of KSUH is concerned it was actually MPI that undertook to procure the agreement of Defendant to execute the Corporate Guarantee upon the finalization of the Debt Restructuring Scheme and the Plaintiff should seek their remedy as against MPI and not the Defendant.

[25] Lim Tuck Sing ('DW2') is a director of the defendant since 7 July 1999. The other director of the defendant at the material time was Syed Ahmad bin Syed Salim. DW2 informed the court that based on cl 11.3 of the term loan facility agreement, it was MPI who gave the undertaking to MIMB. DW2 referred to cl 11.3 of term loan facility agreement which state as follows:

> In further consideration of the premises herein contained, the Borrower undertakes with the Agent and the lenders that upon completion of the debt restructuring scheme ('DRS') and KSUH ('the Guarantor') becoming a related company of the Borrower, the Borrower will immediately cause the Guarantor to executer the Guarantee in favor of the Agent as agent for itself and for the benefit of the lenders.

[26] DW2 pointed out that even though the resolution was dated 14 September 2000, he is very sure that he did not sign it on 14 September 2000. PW1 explained that the letter of offer in respect of the term loan facility by MIMB to MPI itself is dated 14 September 2000 and received by MPI on 15 September 2000. The letter of offer was not sent to the defendant and neither was a copy extended to the defendant. DW2 said that MPI only accepted the offer on 20 September 2000 (refer to p 46 BOD). Therefore, according to DW2, it is impossible for him to have signed the resolution on 14 September 2000.

[27] Further, DW2 clarified that he did not remember the exact date when he signed the resolution but stated that it was probably in late 2000 or early 2001. According to PW2, the resolution was not given to MIMB after signing but was kept by the defendant.

[28] With regards to the prospectus which contains a statement that the defendant had given a corporate guarantee, DW2 explained that the prospectus is prepared by MIMB, not the defendant. MIMB was the financial adviser solely responsible for the statements. DW2 make reference to the prospectus and he said that at p 264 BOD, MIMB has given a statement that:

> MIMB acknowledges that, based on all available information, and to the best of its knowledge and relief, this prospectus constitutes a full and true disclose of all material facts concerning the Offer for Sale and are satisfied that the consolidated profit forecast (for which the Directors of KSUH are fully responsible) prepared for inclusion in this prospectus have been stated by the Directors of KSUH after due and careful enquiry and have been duty reviewed by the Reporting Accountants, Messrs BOD Binder.

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[29] As such, DW2 said that MIMB is responsible for the accuracy of the information in the prospectus. In this regard, DW2 testified that MIMB has all along known that the defendant has never agreed with MIMB to give a corporate guarantee from the defendant.

[30] Jamaludin bin Mohd Nor ('DW3') is the chief financial officer of the defendant. DW3 testified that some time after 10 May 2002, he personally received a request by telephone from someone at MIMB for the extract of the resolution dated 14 September 2000. PW2 told the court that the caller informed him that the bank did not have in their custody copies of the directors' resolution and requested him to fax over to the bank. Subsequently, he then faxed the extract of the directors' resolution to MIMB.

ISSUES

[31] The primary issue that the court has to determine is whether the defendant undertook to execute a corporate guarantee of up to RM40,000,000 in favour of MPI to secure the term loan facility.

EVALUATION OF EVIDENCE AND FINDINGS

[32] In coming to a decision in this case, the court has carefully perused the evidence adduced by both parties, as well as the written submission and authorities filed by both parties in support of their respective cases.

[33] The plaintiff's case against the defendant is premised on the fact that the defendant breached its undertaking and representations in failing to execute a corporate guarantee of up to RM40,000,000 as security for term loan facility granted to MPI.

[34] As the call recalls, PW2 testified that in consideration of the lenders agreeing to grant the term loan facility to MPI, the defendant representatives undertook to execute a corporate guarantee of up to RM400,000 in favour of MIMB.

[35] The court notes that one glaring contradiction emerged in the course of cross-examination of PW2 by learned counsel for the defendant. PW2 maintained that he cannot remember the names of the defendant's representatives who had given undertaking to the plaintiff that the defendant will execute a corporate guarantee. However, when pressed under cross-examination whether the defendant was represented at those meetings, PW2 said that the defendant's representatives Mr Bernard Foo and Mr Ong Boon Poh attended various meetings held with the lenders and MPI during the period of 11 July 2000 to 14 September 2000.

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[36] The court finds that PW2's evidence that Bernard Foo and Ong Boon Poh were representatives of the defendant at those meeting was not supported by evidence. No records, documents or minutes of the meetings were tendered by the plaintiff to show who the representatives of the defendant who attended the meeting.

[37] Perhaps it is appropriate to observe that at this point in giving his evidence PW2 seems to be evasive. The court observes that the evasiveness on the part of PW2 was clearly deliberate and in no way could be described an act of a forgetfulness.

[38] The court notes that with regards to the questions posed by counsel for the defendant whether Bernard Foo and Ong Boon Poh were representatives of the defendant at the material time, PW2 simply choose not to answer the question and at times he said 'I cannot remember'. Even though ten years has lapsed, considering PW2 was the senior manager of the plaintiff at the material time and he was the plaintiff's chief witness, I cannot agree with learned counsel for the plaintiff's explanation in her written submission that PW2 has trouble in understanding and paying attention to the questions posed. I have perused the notes of the proceedings and finds that the questions posed to him are rather straight forward.

[39] It is significant to note that since it is the plaintiff's evidence that Bernard Foo and Ong Boon Poh attended the meeting, the plaintiff ought to have called Bernard Foo and Ong Boon Poh to testify that they in fact attended the meetings and represented the defendant at the material times.

[40] In the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 which was followed by the courts in the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh* [2001] 5 MLJ 317; [2003] 4 CLJ 859 and in *CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 8 MLJ 607; [2010] 3 AMR 194, the Court of Appeal held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Bashir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Bashir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered …

[41] As far as the defendant is concerned, Ong Boon Poh and Bernard Foo were not the defendant's representatives at the material times. In this present

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case, it is not the defendant's burden to discharge who they represented. The defendant's unchallenged evidence is that the defendant did not attend any of the meetings.

[42] Ong Boon Poh and Bernard Foo are the persons who could give the court a firsthand account of all the negotiations between the plaintiff and the defendant. On weighing the evidence very carefully, this court would hold that an adverse inference can be drawn against the plaintiff under s 114(g) of the Evidence Act 1950 for not calling Bernard Foo and Ong Boon Poh to testify. No explanation was given by the plaintiff why Ong Boon Poh or Bernard Foo was not called to give evidence. Bernard Foo and Ong Boon Poh could have cleared the doubt and verified if the defendant had in fact attended the meetings at the material times as representatives of the defendant and had given undertaking to the plaintiff that the defendant will execute a corporate guarantee in consideration of the term loan facility for MPI.

[43] It is noted that in the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ (Rep) 221, Mohamed Azmi SCJ (as he then was) at p 494 (MLJ), p 223 (CLJ) held that:

> It is essential to appreciate the scope of s 114(g) test it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

(see also *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68; *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance* [1999] 1 MLJ 303)

[44] As such, there is no obligation on the defendant to call Mr Ong Boon Poh or Mr Bernard Foo when the plaintiff has no documents and no witness to evidence the defendant's participation or agreements in the meetings. It is implausible that the plaintiff who is giving out a term loan of RM40,000,000 does not have documents that conclusively show that the defendant, not only attended, but agreed to give the corporate guarantee. The court finds that the compelling and irresistible conclusion is that the defendant's representatives neither attended any of the meetings nor agreed to give a corporate guarantee to the plaintiff.

THE DEFENDANT'S RESOLUTION

[45] The plaintiff has further premised its claims on the defendant's resolutions as evidence to show that the defendant, through its representatives,

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did give the undertaking to the lenders at the meetings leading to the availment of the term loan facility. Otherwise according to the plaintiff, it would be rather perplexing as to why the wordings of the resolutions suddenly make reference to an 'undertaking to execute a corporate guarantee' when indeed MIMB's letter of offer dated 14 September 2000 does not specifically mention the undertaking.

[46] PW2 testified that the plaintiff had the resolution before the disbursement of the term loan otherwise it could not have disbursed the term loan facility.

[47] As evidence that the undertaking to the lenders was authorised and empowered by the board of directors and is therefore valid and binding on the defendant, learned counsel for the plaintiff relied on the case of *Pembinaan Bumi Gemilang Sdn Bhd v RHB Bank Berhad & Anor* [2009] 1 LNS 1006. In that case the court held that:

> While it is undeniable that resolutions are internal matters, and may be unilaterally revoked, varied or altered in any manner deem fit by the company passing the resolution in the first instance, in relation to and in the context of relationships with third parties, resolutions may have and often do have, entirely different application and interpretation. resolutions, if properly passed, are evidence of decisions taken at board meetings. Subject to the contents therein, resolutions frequently impact on the relationship of the company inter se and with parties other than the company. It is in the light of the relationship with third parties that these resolutions are relevant and must now be examined. It may very well be the plaintiff's resolve to make any particular decision. But, that is not the end of the matter. How that decision ultimately impacts is to be considered having regard to the context and role it was placed at the outset.

[48] However according to DW1, the plaintiff could not have disbursed the loan relying on this resolution as the said resolution was never in the plaintiff's custody at the time the term loan was disbursed to MPI. It is the defendant's position that a copy of the resolution was in fact obtained by the plaintiff only some time in June 2002, more than one and half years after the loan was disbursed by the plaintiff to MPI.

[49] The court notes that the it is not in dispute that the MIMB had in its possession the original copies of the defendant's resolutions dated 14 September 2000 signed by DW2 and Syed Ahmad bin Syed Salim which resolved, inter alia, as follows:

> That in consideration of … Malaysian International Merchant Bankers ('MIMB') … and Malaysian Industrial Development Finance Berhad ('MIDF') … vide MIMB's Letter of Offer dated 14 September 2000 agreeing to grant the term loan facility ('the Facility') of up to RM40.0 Million to May Plastics Industries Berhad

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('MPI') for the purposes of financing the early redemption of MPI's RM40.0 Million 3.5% Guaranteed Redeemable Bonds 1996–2001 maturing on 3rd September 2001, the Company do hereby undertake to execute a corporate guarantee for up to RM40.0 Million, in favour of MIMB to secure the said Facility, upon such terms and conditions as are stipulated in the Deed of Guarantee.

[50] In the light of the above, the key issue that the court has to consider is whether when the term loan was disbursed to MPI, the defendant had given the defendant's resolution to the plaintiff. On this issue, the court finds that by its letter dated 18 April 2002 the plaintiff wrote to MPI requesting a copy of the resolution. The said request clearly supports the defendant's case that the plaintiff did not have the resolution prior to the disbursement of the term loan as otherwise they would not have had to ask for the resolution.

[51] DW3 in his evidence said that it was some time after 10 May 2002 that he personally received a request by telephone from someone at MIMB for the extract of the director's resolutions dated 14 September 2000 since the bank did not have in their custody copies of the said director's resolutions.

[52] The evidence of DW2 is that he signed the resolution (at p 399 of BOD) some time in the last week of December 2000 or during the Chinese New Year holidays in January 2001. At the time when he signed the resolution he did not date it.

[53] As such on this issue, I find that the plaintiff has not adduced any contemporaneous documentary evidence whatsoever to show when, how and from whom it received the resolution and in particular, that they received the resolution before the disbursement of the term loan as alleged. The plaintiff's failure to explain how and when exactly they received the said resolution support the defendant's position that the plaintiff did not have the resolution when disbursed the loan. This is what PW1 said:

Q102. Was there a covering letter forwarding this resolution?

A102. There's no covering letter.

[54] Based on the evidence adduced by the parties, the court finds that the plaintiff did not have the resolution at the time the term loan was disbursed. There can be no other reasonable or logical explanation for the repeated requests for a resolution.

[55] Upon considering to totality of the evidence adduced and the documentary evidence submitted, the court finds that on the balance of probabilities the resolution had not been given to the plaintiff when the term loan was disbursed to MPI by the plaintiff.

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[56] In the case of *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors* [1994] 3 MLJ 405, the plaintiff claimed certain sums of money which is allegedly advanced to the defendants. It relied on, inter alia, a director's resolution to the effect that the company would advance a sum totaling RM360,000 without interest to various directors and shareholders. In that case, KC Vohrah J (as he then was) held as follows:

> I fail to see how the resolution can be considered as a contract between the plaintiff company and its new shareholders. That the document shows that it is a resolution signed by three directors stating that the company 'do hereby make an advance' to the directors and shareholders does not indicate that it is a contract. Nowhere in P1 is it shown that there was an offer to lend money by the plaintiff company and that the offer was accepted by the defendants. More specifically, there is nothing in the resolution which shows that 'at the request of the defendants the plaintiff advanced and the defendants borrowed …' certain sums of money as averred in para 5 of the statement of claim. I fail to see how either s 91 or s 92 of the Evidence Act 1950 can be invoked.

[57] Applying the decision in *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors*, it is clear that the resolution is an internal document of the defendant authorising and empowering the defendant to do and carry out matters stipulated therein. It does not however require or compel the defendant to do or carry out any of the matters stated therein.

[58] Thus, it would therefore be clearly wrong in law for this court to accept the plaintiff's contention that the resolution is an undertaking given by the defendant to the plaintiff capable of being specifically enforced (see *Lam Eng Rubber Factory (M) Sdn Bhd; Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action* [1996] 3 MLJ 385).

[59] By law the resolution has no legal binding effect vis-a-vis the company, the defendant in this case, and a third party, the plaintiff in this case. It does not create any legal relationship between the plaintiff and the defendant.

[60] In my judgment on the balance of probabilities the defendant did not at any time whatsoever enter into any contractual relationship with the plaintiff vis-a-vis the term loan and neither did it give the defendant any undertaking whatsoever to execute a corporate guarantee in favour of the plaintiff as alleged by the plaintiff. PW1 confirms in answer to question 52 that the plaintiff did not have a contract with the defendant.

[61] The only undertaking the plaintiff had vis-a-vis the corporate guarantee was the undertaking given by MPI in cl 11.3 of the term loan agreement to procure the execution of a corporate guarantee by the defendant. This is

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confirmed by PW1 in her answer to question 48.

THE DEFENDANT'S PROSPECTUS

[62] The plaintiff had also relied on the defendant's prospectus dated 30 March 2003 and letter dated 11 July 2001 and 16 July 2001, as corroborative evidence to show that the defendant did give an undertaking to provide a corporate guarantee to the defendant. Section 10.3 (at p 284 of bundle B) of the prospectus states that one of the contingent liabilities of the defendant was the corporate guarantee to be provided by the defendant in favour of the lenders.

[63] Learned counsel for the plaintiff contended that whilst the prospectus was prepared by MIMB Advisory, the contents of such prospectus were verified by the directors of the defendant who clearly accepted full responsibility for the accuracy of the information provided therein. It was further argued by the plaintiff that given that the contents of the prospectus were premised on the defendant's own letter dated 25 March 2002 (pp 304–305 of BOD) as signed by the defendant's ex-director, Mr Ong Boon Poh, it is therefore not open to the defendant to deny the contents of the prospectus or blame MIMB for any inaccuracy.

[64] With regrets, the court finds that no undertaking or any representation was given by the defendant to the plaintiff in respect of the corporate guarantee in the proposed scheme or the defendant's prospectus. MIMB and the plaintiff were advisers of the proposed scheme and prepared the defendant's prospectus. They were full conversant with all the material facts pertaining to the corporate guarantee and were aware at all times that not only had the corporate guarantee had not been executed, there was no undertaking whatsoever given by the defendant to execute the corporate guarantee. The only undertaking was by MPI to the plaintiff, pursuant to cl 11.3 of the term loan agreement which reads as follows:

> 11 March Execution of Guarantee
>
> In further consideration of the premises herein contained, the Borrower undertakes with the Agent and the lenders that upon completion of the DRS and the Guarantor becoming a related company of the Borrower, the Borrower will immediately cause the Guarantor to execute the Guarantee in favour of the Agent as agent for itself and for the benefit of the lenders.

TERMS OF THE CORPORATE GUARANTEE

[65] In the present case, the draft guarantee and indemnity prepared by the plaintiff's solicitors Messrs Nik Hussain & Partners dated 3 September 2002

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incorporated about ten main clauses. The plaintiff submitted that the undertaking given by the defendant already sets out the essential terms of the corporate guarantee, namely that:

(a) The identity of the parties to the guarantee — the corporate guarantee was to be provided by the defendant, as guarantor, in favour of MIMB (agent for itself and MIDF), as guarantee.

(b) The amount guaranteed — a sum of up to RM40,000,000.

(c) The consideration for the guarantee — lenders agreeing to grant a term loan facility ('the facility') of up to RM40,000,000 to May Plastics Industries Bhd ('MPI') for the purposes of financing the early redemption of MPI's RM40,000,000 3.5% guaranteed redeemable bonds 1996–2001 maturing on 3 September 2001.

(d) The purpose of the guarantee — as security for the term loan facility.

(e) Other terms and conditions — to be contained in a deed of guarantee.

[66] It is the plaintiff's submission that given that the defendant's undertaking sets out the essential terms of the guarantee to be provided by the defendant in favour of MIMB, as shown in para 64 above, there is a valid and enforceable agreement between the parties although the specific terms and conditions of the deed of guarantee/corporate guarantee was not agreed upon. Learned counsel for the plaintiff made reference to the Federal Court decision in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 where the court held that there was a binding agreement between parties based on the correspondence letters exchanged between parties although the formal sale and purchase agreement was not executed because the parties to the transaction, the property, the price and the essential terms were identified with sufficient certainty. It was further held that the phrase 'subject to the sale and purchase agreement' did not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed.

[67] It was further argued by learned counsel for the plaintiff that as there is a valid and binding agreement between the parties, the fact that the defendant had not confirmed its agreement to the terms of the deed of corporate guarantee at the time of the defendant's undertaking, does not preclude the relief for specific performance of the undertaking. The plaintiff has relied on the Federal Court decision in *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39; [1983] CLJ 231 (Rep), where the appellants agreed to sell the land, the subject matter of the dispute, to the respondent by a letter dated 1 March 1976, subject to contract, which letter was followed by another dated 3 March 1976. The respondent alleged that the second letter concluded the negotiations and confirmed the sale. It was held that:

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There was nothing to show that at any time the respondent departed from any of the terms originally agreed. The only matter outstanding to complete the deal, in so far as the respondent was concerned, was the formal execution of the agreement.

[68] Given that the defendant is estopped from challenging the form and substance of the guarantee and indemnity (pp 375–397 BOD), the plaintiff seeks for an order that the defendant specifically performance its undertaking to execute a corporate guarantee by signing and returning the guarantee and indemnity.

[69] The defendant however contended that they had never agreed to the terms and conditions of the draft guarantee and indemnity and the plaintiff failed to present any evidence that indicates that the terms and conditions of the draft guarantee and indemnity have been accepted and agreed by the defendant. It was further submitted by the defendant that the parties have never reached consensus and idem and that the guarantee was to be executed in a formal contract. Learned counsel for the defendant referred the court to the Supreme Court's decision in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, a case where the primary issue was whether there was a concluded contract between the appellant as employer and the respondent as contractor.

[70] Edgar Joseph Jr SCJ (as he then was) delivering the judgment of the court held at p 763 as follows:

The existence of an agreement depends upon the intention of the 'parties' and that for there to be an agreement the parties must be ad idem who must be ad idem, there ie must be a concensus between them … authorities show that such inference must be drawn. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract.

[71] The test set-out by Edgar Joseph SJC was adopted by the High Court in the case of *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action* [1996] 3 MLJ 399. This is what was said in the High Court:

It however, must be stressed that each case must be decided on its own. This is especially so in cases dealing with preparatory agreements where the intention of the parties plays a crucial role in determining its effect. In each case, it is the duty of the court to determine not only the nature of the document, but also the true intention of the parties at the time the document was execute — whether the parties intended to be bound by any contract immediately, or only on the fulfillment of certain conditions, eg the execution of a formal contract.

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[72] In the case of *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy*, the court also relied on the dictum of Sir Garfield Barwick in the Privy Council decision of *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & anor appeal* [1981] 1 MLJ 56, where His Lordship made the following observation at p 58:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangement might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words.

[73] However, in certain exceptional cases where the intention of the parties is clearly established, an immediately binding contract may come into force, even though a formal agreement is to be executed subsequently as Edgar Joseph Jr SCJ (as he then was) observed in *Ayer Hitam*'s case at p 765:

> True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at pp 288, 289 where the court said this:
>
> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

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[74] Further down at p 765 His Lordship states:

> But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v Denn*) or 'subject to the preparation and approval of a formal contract' (see *Winn v Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

[75] In *Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713, the Court of Appeal in considering whether there was in existence a contract when only drafts were exchanged had this to say:

> The facts found by the trial judge and the evidence led establish conclusively that when Ho and Fam instructed their respective solicitors, each of them had in mind that their differences would be resolved by a formal agreement in writing to be drafted by Max, which was to be approved by each of their solicitors, and that Ho and Fam each intended to contract with the other by a document which each of them will be required to sign. In such a situation, nothing short of signing the document by both parties could bring a contract into existence.
>
> In such circumstances, the rule is that … even although the terms to be included in the documents have been agreed, there is no contract and each party has a locus poenitentiae until at least execution on both sides.
>
> These concepts are not new. Reference can be made to the standard text books as well as *Carruthers v Whitaker* [1975] 2 NZLR 667, and *Concorde Enterprises Ltd v Motors (Anthony Hutt) Ltd* [1981] 2 NZLR 385, as well as *Shell Oil v Wordcom Investments* [1992] 1 NZLR 129.
>
> Therefore, in all the circumstances of this case, my view is that even of as Murthi contends, all the terms had been agreed, there is no contract here because Fam did not sign it.

[76] Similarly, in *Crossley v Maycock* (1874) 43 LJCH 379 Sir George Jessel MR said this:

> If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the court will enforce.

[77] In the present case, none of the documents relied on by the plaintiff showed an ad idem between the parties on the terms and conditions of the draft guarantee and indemnity. The court finds that there were no terms and conditions that were agreed or a standard guarantee or a draft guarantee annexed to the term loan that the defendant was bound to execute.

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[78] It must be emphasised that only on 10 July 2002 M/s Nik Hussain & Partners sent a specially drafted document entitled guarantee and indemnity which was a 'Draft' 'for your perusal and approval' and with an invitation to 'revert to us with your approval to the said draft'. The subsequent letter dated 22 July 2002 also invited the defendant to 'revert to us with your comments'.

[79] In regards to the second paragraph of M/s Nik Hussain & Partner's letter dated 10 July 2002 and 22 July 2002, the only possible inference of fact that could reasonably be drawn concerning the draft guarantee and indemnity was that it was an offer by M/s Nik Hussain & Partner to settle on the terms of the draft guarantee and indemnity and no more. The defendant did not accept the offer and did not sign the guarantee and indemnity. Thus, there was no contract binding on the defendant.

[80] It appears to me that the parties have never reached consensus ad idem and that even the plaintiff contended that the guarantee was to be executed in a formal agreement. In such a situation 'nothing short of signing the document by both parties could bring a contract into existence'.

CONCLUSION

[81] After looking at the totality of all the evidence adduced on the issue of whether the defendant had given an undertaking to the plaintiff to provide a corporate guarantee as consideration for the term loan granted to MPI, the court finds that the plaintiff has not succeeded in proving on a balance of probabilities, that the defendant had given such undertaking. Where there is no written agreement and the fact of the undertaking is in dispute, the court will have to look at all the facts as well as the evidence afforded by contemporaneous documents to attempt to decide the true situation. The court finds that the evidence as adduced does not support the plaintiff's contention that the defendant has given the undertaking to the plaintiff.

[82] In conclusion, the court finds that the plaintiff has not made out a case against the defendant on a balance of probabilities. Accordingly, the plaintiff's case against the defendant is dismissed with costs.

Plaintiff's case dismissed with costs.

Reported by Kanesh Sundrum